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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sean Patrick Husband,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-13-01320-PHX-DLR

ORDER

15 Pending before the Court is the Report and Recommendation (“R&R”) of
16 Magistrate Judge Deborah M. Fine (Doc. 90), Respondent’s Objections to Magistrates
17 Report and Recommendation (Doc. 93) and Petitioner’s Response to State’s Objections
18 (Doc. 94.).

19 The R&R recommends that the Court order that Petitioner’s habeas petition be
20 amended to included Ineffective Assistance of Appellate Counsel (“IAAC”) and
21 ineffective assistance of PCR counsel claims and that the Court find that *Martinez v.*
22 *Ryan*, 132 S. Ct. 1309 (2012) is applicable to excuse Petitioner’s procedural defaults of
23 his IAAC claim and his irreconcilable conflict claim in Grounds One and Six of his
24 Amended Petition. The R&R recommends that the Court conduct a hearing to allow
25 Petitioner to establish cause and prejudice for the procedural defaults. The Court agrees
26 with Magistrate Judge that after *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013) the
27 *Martinez* standard for “cause” applies where the counsel for the post-conviction state
28 proceeding was unable to raise the IAAC claim in the PCR because appellate and PCR

1 counsel were one and the same. The Court further agrees with the Magistrate Judge that
2 in Arizona an indigent defendant has no right to court appointed counsel for the second
3 PCR and therefore Petitioner had no realistic opportunity to raise the IAAC in state court
4 when appellate counsel and PCR counsel were one in the same. The court agrees with
5 the Magistrate Judge that Petitioner's failure to present the second IAAC claim in state
6 court is not a fatal procedural default. Further, the Court agrees that Petitioner should be
7 afforded a hearing to establish cause and prejudice.

8 The Magistrate Judge advised the parties that they had fourteen days to file
9 objections to the R&R. (R&R at 15 (citing 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72)).
10 Respondent filed its objections on August 3, 2016 (Doc. 93) and Petitioner filed his
11 Response to State's Objections to Magistrate's Report and Recommendation on August
12 17, 2016. (Doc. 94.)

13 The Court has considered the objections and reviewed the Report and
14 Recommendation de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that
15 the court must make a de novo determination of those portions of the Report and
16 Recommendation to which specific objections are made). The Court agrees with the
17 Magistrate Judge's determinations, accepts the recommended decision within the
18 meaning of Rule 72(b), Fed. R. Civ. P., and overrules Respondent's objections. *See* 28
19 U.S.C. § 636(b)(1) (stating that the district court "may accept, reject, or modify, in whole
20 or in part, the findings or recommendations made by the magistrate").

21 **IT IS THEREFORE ORDERED that** Report and Recommendation of the
22 Magistrate Judge (Doc. 90) is accepted.

23 **IT IS FURTHER ORDERED that** Petitioner's habeas petition be amended, as
24 requested by Petitioner's counsel (Doc. 89 at 5), to include IAAC and ineffective
25 assistance of PCR counsel claims.

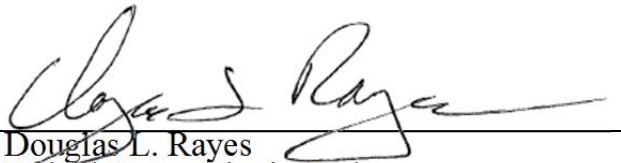
26 **IT IS FURTHER ORDERED that** *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), is
27 applicable to excuse Petitioner's procedural defaults of his IAAC claim and his
28 irreconcilable conflict claim in Grounds One and Six of his Amended Petition Under 28

1 U.S.C. § 2254 (Doc. 15).

2 **IT IS FURTHER ORDERED** setting a hearing on **November 22, 2016 at 1:30**
3 **p.m.**, for four hours to allow Petitioner the opportunity to establish cause and prejudice
4 for the procedural defaults.

5 Dated this 30th day of September, 2016.

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Douglas L. Rayes
United States District Judge